

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

SDMS, Inc., et al.,

Plaintiff,

vs.

ROCKY MOUNTAIN CHOCOLATE  
 FACTORY, INC.,

Defendant.

CASE NO. 08 CV 0833 JM (AJB)

**ORDER REQUESTING FURTHER  
 BRIEFING**

Plaintiffs are former franchisees of defendant Rocky Mountain Chocolate Factory, Inc. They filed a first amended complaint ("FAC") in this action on May 13, 2008. Plaintiffs assert claims for violation of California Business and Professions Code §§ 17000 and 17200, arising out of the franchise agreement with Defendant. On June 24, 2008, Defendant moved to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. no. 7.) Plaintiffs filed an opposition and Defendant a reply. The court took the motion under submission on August 1, 2008.

**I. CHOICE-OF-LAW AND FORUM-SELECTION CLAUSES**

In its reply, Defendant notes in a footnote that the franchise agreement contains a choice-of-law clause. (Reply at 3 n.2.) The clause states, inter alia, that "any disputes between the parties shall be governed by and determined in accordance with the substantive laws of the state of Colorado, which laws shall prevail in the event of any conflict of law." (FAC, Exh. 2 (Franchise Agreement) at 31 ¶ 22.1.) The clause also states that "all parties agree that the exclusive venue for disputes

1 between them shall be in the state courts in La Plata County, Colorado and federal courts located in  
 2 Colorado[.]” (Id.) Defendant briefly argues that the court should enforce the choice-of-law provision  
 3 and dismiss the complaint outright. (See Reply at 3 n.2.) Defendant does not address the forum-  
 4 selection clause. Plaintiffs reference these issues in the FAC (see FAC at 10-11 ¶¶ 35-37) and do not  
 5 address the issues in their opposition papers.

6 The court hereby **REQUESTS** further briefing regarding the enforceability and of the choice-  
 7 of-law and forum-selection clauses, and the impact of the clauses on the viability of Plaintiff’s  
 8 California-law claims.

9 The parties should keep the following principles in mind in addressing the court’s request  
 10 regarding the choice-of-law clause. Federal courts look to the law of the forum state in resolving  
 11 choice of law issues. See Ticknor v. Choice Hotels Intern., Inc., 265 F.3d 931, 937 (9th Cir. 2001);  
 12 Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 641 (9th Cir. 1988). “In determining the  
 13 enforceability of . . . contractual choice-of-law provisions, California courts shall apply the principles  
 14 set forth in the Restatement (Second of Conflict of Laws) section 187 which reflects a strong policy  
 15 favoring enforcement of such provisions.” Nedlloyd Lines B.V. v. Super. Ct., 3 Cal.4th 459, 464  
 16 (1992). Section 187 provides, in pertinent part:

17 The law of the state chosen by the parties to govern their contractual rights and duties  
 18 will be applied even if the particular issue is one which the parties could not have  
 resolved by an explicit provision in their agreement directed to that issue, unless either

19 (a) the chosen state has no substantial relationship to the parties or the transaction and  
 20 there is no other reasonable basis for the parties choice, or

21 (b) application of the law of the chosen state would be contrary to a fundamental  
 22 policy of a state which has a materially greater interest than the chosen state in the  
 determination of the particular issue and which, under the role of section 188, would  
 be the state of the applicable law in the absence of an effective choice of law by the  
 parties.

23 Restatement (2d) of Conflict of Laws §187(2) (1988). In determining the enforceability of a  
 24 contractual choice-of-law provision, the court must first determine (1) whether the chosen state has  
 25 a substantial relationship to the parties or transaction or (2) whether there is any other reasonable basis  
 26 for the parties’ choice of law. If either test is met then the court must next determine whether the  
 27 chosen state’s law is contrary to a fundamental policy of California. If there is no conflict, the court  
 28 must enforce the parties’ choice of law. If there is a fundamental conflict with California law, the

1 court must then determine whether California has a materially greater interest than the chosen state  
2 in the determination of the particular issue. If California has a materially greater interest, then the  
3 choice-of-law provision will not be enforced. See Nedlloyd, 3 Cal.4th at 464-466. Finally, California  
4 has a “strong policy favoring enforcement” of choice of law provisions. ABF Capitol Corp. v. Osley,  
5 414 F.3d 1061, 1065 (9th Cir. 2005).

## 6 **II. ABSTENTION**

7 The parties also discuss a simultaneous ongoing lawsuit brought by Defendant against  
8 Plaintiffs in the federal district court for the District of Colorado. Defendant’s motion refers to this  
9 as the “Colorado action.” (Mot. at 2; see also id., Exh. B (Amended Comp., Civ. Case No. 06cv01212  
10 WYD (BNB) (D. Col. 2006)).) According to Defendant, the Colorado court granted in part and denied  
11 in part the parties’ cross-motions for summary judgment (see id., Exh. H (Summary Judgment Order)),  
12 and trial is set for November 2008 in the Colorado action (Mot. at 1.) The Colorado action appears  
13 to involve issues similar to those raised in the instant case.

14 In light of the Colorado action, the court also **REQUESTS** further briefing regarding issues  
15 of abstention which may be implicated in this case. Such briefing should address, but is not limited  
16 to, whether the court should abstain under the doctrine articulated in Younger v. Harris, 401 U.S. 37  
17 (1970).


## 18 **III. CONCLUSION**

19 In sum, the court hereby **ORDERS** the parties to submit further briefing, as discussed above,  
20 regarding (1) the choice-of-law clause and forum-selection clause; and (2) abstention issues, including  
21 the Younger doctrine.

22 Plaintiffs are ordered to file and serve a supplemental brief, limited to eight pages, no later than  
23 September 5, 2008. Defendant is ordered to file and serve a response, limited to eight pages, no later  
24 than September 12, 2008.

25 **IT IS SO ORDERED.**

26 DATED: August 27, 2008

27   
28 Hon. Jeffrey T. Miller  
United States District Judge